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Decision

Matter of: Outdoor Venture Corporation

File: B-288894.2

Date: December 19, 2001

Marc Lamer, Esq., Kostos & Lamer, for the protester.
Steven S. Diamond, Esq., and Robert J. Wagman, Jr., Esq., Arnold & Porter, for Camel Manufacturing Company, an intervenor.
Vera Meza, Esq., and Peter J. Tuttle, Esq., U.S. Army Materiel Command, for the agency.
Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Proposal that failed to satisfy material solicitation requirement, even after offeror had been apprised of this deficiency during discussions, properly was rejected as technically unacceptable after initially having been included in the competitive range.
 2. Solicitation provision that multiple awards are anticipated does not obligate agency to make more than one award where only one technically acceptable proposal is received.
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DECISION

Outdoor Venture Corporation (OVC) protests the agency's decision to reject OVC's proposal as technically acceptable and to make a single contract award to Camel Manufacturing Company under request for proposals (RFP) No. DAAD16-00-0031, issued by the Army Materiel Command (AMC) as a total small business HUBZone set-aside for the procurement of certain lightweight maintenance enclosures (LME) and associated spare and repair parts.

We deny the protest.

BACKGROUND

The RFP, issued on February 16, 2001, contemplated the award, using “best-value” criteria, of multiple indefinite-delivery/indefinite-quantity contracts for a base 3-year ordering period with two 3-year option periods, during which delivery order competition was anticipated. The RFP set forth a minimum production contract value of \$200,000 if a single award was made or \$100,000 if multiple awards were made, and included a first-article test sample requirement for two LMEs for the limited purpose of agency inspection to verify interchangeability between LMEs.

AMC had developed an LME performance specification (LME PS) that was used as the basis for a solicitation issued in 1997, under which OVC had competed unsuccessfully and Camel had been awarded a low rate initial production contract with follow-on production options. The statement of work (SOW) under the current solicitation required production in accordance with the LME PS, and in particular, the contractor was required to “develop, fabricate, integrate, test, document, deliver and support the LME system to meet the requirements of the [attached LME PS].” RFP § C2.3. To ensure compliance, offerors were required to submit a proposal that “meets or exceeds the minimum performance requirements described in the LME PS.” RFP § C2.1. The LME PS contained a number of specific testing requirements, including requirements for full scale performance verification testing under specified environmental conditions. Agency Report (AR), Tab F, LME PS, at 8-24. The agency made available for review technical drawings that had been provided by Camel under the predecessor contract, that did not constitute a comprehensive data package, but were furnished to ensure that follow-on systems would be compatible with the existing LME. Contracting Officer’s Statement at 4.

Only two proposals were received by the May 1 closing date, one from Camel, the other from OVC. The agency evaluated Camel’s proposal as technically acceptable and OVC’s proposal as technically unacceptable. However, OVC proposed a substantially lower evaluated price than Camel, and the source selection authority (SSA) decided to include OVC’s proposal in the competitive range. The agency conducted discussions using written discussion items (DI); Camel was given three DIs and OVC was given 52 DIs. After receiving written responses, on August 24, the agency solicited final proposal revisions (FPR), due by August 29, 2001. On September 5, the SSA concluded that OVC’s proposal remained technically unacceptable, and therefore determined to make one award only, to Camel, the only offeror that had submitted a technically acceptable proposal. AR, Tab Q, SSA Decision Document, at 2. OVC received a debriefing on September 18, and subsequently timely filed this protest with our Office.

OVC protests that the agency improperly rejected OVC’s proposal based on its failure to evaluate OVC’s proposal in accordance with the RFP or to conduct meaningful discussions, and that the decision to make only one award to Camel at a substantial price premium is arbitrary and not in accordance with the solicitation criteria.

EVALUATION AND DISCUSSIONS

Where a protester challenges an agency's evaluation resulting in the rejection of its proposal as technically unacceptable, our review is limited to considering whether the evaluation and determination were reasonable and in accordance with the terms of the RFP and applicable regulations and statutes. Loral Sys. Co., B-270755, Apr. 17, 1996, 96-1 CPD ¶ 241 at 7. In this regard, it is the offeror's responsibility to include sufficiently detailed information in its proposal to establish that the item offered will meet material solicitation requirements, and blanket statements of compliance are insufficient to fulfill this obligation. TRS Research, B-274845, Jan. 7, 1997, 97-1 CPD ¶ 6 at 3. Clearly stated RFP technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Team One USA, Inc., B-272382, Oct. 2, 1996, 96-2 CPD ¶ 129 at 8.

Here, the RFP set forth evaluation "areas" consisting of technical, price, management, and past performance, in descending order of importance. RFP § M4. The technical area consisted of two factors (design and facilities/equipment), and the management area consisted of three factors. Id. The RFP stated that "[t]o receive consideration for award, overall evaluations of not less than 'Acceptable' must be achieved for the Technical and Management Areas. An evaluation of 'Unacceptable' at the factor level will cause the entire area to be evaluated as 'Unacceptable.'" RFP § M2.

OVC's initial proposal was evaluated by the source selection evaluation board (SSEB) as unacceptable/high risk under the technical and management areas, and under each of the factors within both areas. AR, Tab J, Initial SSEB Report, at 3-19. Based on the SSEB evaluation, the SSA concluded that OVC "presented the Government with a poorly written proposal that failed to adequately address numerous solicitation requirements and did not demonstrate a clear understanding and approach to satisfying the performance and schedule requirements of the solicitation." AR, Tab K, Competitive Range Determination, at 2. The contracting officer explains that "[d]espite numerous deficiencies the [OVC] proposal was retained in the competitive range in recognition of the solicitation's stated preference for multiple awards and the significant cost savings that might be achieved should the company respond to the deficiencies during discussions and demonstrate its ability to produce a technically acceptable LME." Contracting Officer's Statement at 5.

OVC's written responses to the 52 DIs, in which the agency had identified the numerous evaluated deficiencies in detail, and OVC's FPR were again evaluated as unacceptable in both the technical and management areas and in each of the five factors within the two areas. The SSEB recommended that:

OVC should no longer be considered in the Competitive Range. The SSEB has not been convinced that OVC would be able to produce a shelter that would meet the minimum LME Performance Specifications. . . . OVC did not understand the difference between a 'build to print' project and the production of an item to meet performance specifications. There was no tangible evidence how OVC planned to 'duplicate' the current LME since it proposed using at least two different materials. Of great concern was OVC's contention that it was not necessary to operationally test a new project to all of the environmental tests required by the Performance Specifications. . . . [Accordingly, t]he SSEB does not recommend awarding a contract to OVC but recommends a single contract award to Camel Manufacturing Company.

AR, Tab P, Final SSEB Report, at 36.

The SSA adopted the SSEB's evaluation and determined to make a single award to Camel, despite the possible price savings associated with the OVC proposal, because of OVC's "unacceptable and high risk technical and management [area] evaluations." AR, Tab Q, SSA Decision Document, at 2.

The agency's core concern was that while proposing to use a different material for the walls of the LME, OVC submitted a minimal initial technical design proposal which simply stated OVC's intention to "duplicate the current design which has already been fielded and certified to meet the performance requirements." OVC Technical Proposal at 1. OVC had proposed to ensure design compliance by offering to use specified "suppliers [that] have the collective experience to successfully meet all the required L.M.E. performance requirements" Id. OVC's proposal did not offer to perform the environmental testing requirements that were contained in the LME PS. In this regard, the RFP proposal preparation instructions specified with respect to the technical design factor as follows:

The Offeror must demonstrate a thorough understanding of each performance based specification requirement and individually address how its proposed design meets each of these requirements in a thorough and convincing manner. The Offeror shall describe how it will meet the performance requirements within the proposed delivery schedule. Computer analysis, test data, computation, design sketches, or other supporting data used to support the design concept should be included.

RFP § L7.d.

The evaluation criteria explicitly called for evaluation of the offeror's proposed design "for meeting all the performance requirements in the performance specifications." RFP § M5.

The agency expressed its concern during discussions in DI No. 5, which provides:

OVC states in its technical proposal that it will duplicate the current LME design. Please discuss in detail if OVC has built any LME components, conducted any in-house testing against the current LME performance specification requirements, and performed a structural analysis of its proposed duplicate LME design. Please discuss/demonstrate how OVC's proposed design, (regardless of whether it is the same as the current design) will meet the performance specification requirements. Based on OVC technical proposal, the Government is not thoroughly convinced that OVC has a thorough understanding of the LME design. Please demonstrate your capability in producing its proposed design and how that design will meet all of the performance specification requirements of this solicitation.

AR, Tab L, DIs, at 2.

OVC's written response pointed to the similarity between the current qualified LME design and products that OVC and its suppliers had already produced and stated "OVC and [its] proposed suppliers/subcontractors have thoroughly reviewed the [Camel drawings] and believe the information provided is sufficient to duplicate the current design." OVC Response to DIs at 2. OVC went on to state that while it understands its responsibility to meet the performance requirements, "it is proposing to forego the expense of full scale verification testing for certain environmental conditions due to their cost. Specifically, the Wind Resistance Verification, Rain Resistance Demonstration and Snow and Sleet Resistance Verification and other full scale testing have been omitted." Id. at 4. OVC explained that it "believes the above full scale tests are not economically justifiable due to the duplication of the current design." Id. OVC did not propose any changes in this regard in its FPR.

The SSEB determined that:

OVC's proposal to forego . . . full scale testing is not justifiable. The specific tests that OVC wants to forego are some of the most critical tests which need to be accomplished to prove that the OVC design is a duplicate of the current LME. . . . OVC has not provided any engineering data or analysis that their proposed 'copy of the LME design' meets or exceeds the minimum performance requirements of the LME Performance Specification. They sought an outside consultant who told them it is not needed. . . . The SSEB does not understand how this reflects whether or not the complete LME performance specifications can be met.

AR, Tab P, Final SSEB Report, at 13.

This determination was adopted by the SSA. AR, Tab Q, SSA Decision Document, at 1.

In a negotiated procurement, a proposal that fails to satisfy a material solicitation requirement is technically unacceptable and cannot form the basis for an award. Techseco, Inc., B-284949, June 19, 2000, 2000 CPD 105 at 3. Here, the agency reasonably concluded that OVC's proposal did not show that "OVC would be able to produce a shelter that would meet the LME Performance Specifications." AR, Tab P, Final SSEB Report, at 36. OVC's initial proposal did not offer to perform a number of tests required under the RFP which the agency reasonably believed were crucial to show understanding and ability to produce the LME. During discussions, in response to the agency's question in this regard, OVC specifically refused to offer to perform the required testing. Accordingly, the agency reasonably rejected OVC's proposal as technically noncompliant.

In these circumstances, OVC's assertion that the agency failed to conduct meaningful discussions is without merit. As described above, the record shows that the agency clearly raised its concern that OVC failed to satisfy the LME PS requirements, in response to which OVC reiterated and defended its proposal not to satisfy the testing requirements.¹ The protester's election to proffer an inadequate and unacceptable response does not provide any basis to question whether the discussions were meaningful.

SINGLE AWARD

OVC also contends that the agency's decision to award only one contract was arbitrary and not in accordance with the terms of the RFP. OVC takes the position that the award provision calling for multiple awards required that OVC receive an award here because of the associated significant potential cost savings and the low risk to the government. This contention is misplaced, since a proposal that is technically unacceptable cannot be considered for award regardless of the possible cost savings to the government. Ritchie Sawyer Corp., B-281241.2, Jan. 25, 1999, 99-1 CPD ¶ 21 at 3.

¹ To the extent that the real thrust of OVC's protest is a contention that the testing requirements contained in the RFP are improper and unfairly favor the incumbent, this protest allegation, first filed after the award was made, is untimely and not for consideration on the merits. A protest against an alleged apparent solicitation impropriety must be filed no later than the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (2001); Elementar Americas, Inc., B-282698, July 16, 1999, 99-2 CPD ¶ 17 at 4.

Moreover, the RFP states that “[t]he Government anticipates that it will award multiple contracts as a result of this Request for Proposal, but reserves the right to make a single award when in the best interest of the Government,” and further provides that “[t]o receive consideration for award, overall evaluations of not less than acceptable must be achieved.” RFP § M2. The statement that the agency “anticipates” multiple awards means nothing more than that the agency has an expectation that there will be more than one award, and does not create any legal obligation to make multiple awards. Canadian Commercial Corp./Liftking Indus., Inc., B-282334 et al., June 30, 1999, 99-2 CPD ¶ 11 at 9. Here, the RFP also expressly warns that a proposal must be evaluated as acceptable to be considered for award, and reserves the right to make only one award. Accordingly, a single award to Camel in the circumstances presented is consistent with the RFP award criteria.

The protest is denied.

Anthony H. Gamboa
General Counsel